Order

Michigan Supreme Court
Lansing, Michigan

March 30, 2022

Bridget M. McCormack,
Chief Justice

162332-3

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

DENISE DOSTER,
Plaintiff-Appellant,

v

SC: 162332-3
COA: 349560, 350941
Saginaw CC: 17-034216-CD

COVENANT MEDICAL CENTER, INC.,
Defendant-Appellee.

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On January 12, 2022, the Court heard oral argument on the application for leave to appeal the September 17, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REMAND this case to the Saginaw Circuit Court for entry of an order denying the defendant's motion for summary disposition, rendering judgment in favor of the plaintiff for $540,269.64, and for further proceedings consistent with this order.

The plaintiff, Denise Doster, sued her employer for age discrimination under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*., in connection with its decision to hire a younger candidate for a position in her department. After discovery, the defendant filed a motion for summary disposition under MCR 2.116(C)(10), arguing that it had a legitimate, nondiscriminatory reason for its hiring decision. The trial court denied the motion, finding a question of fact remained as to whether the employer's proffered reason was pretextual. The defendant did not appeal, and the case proceeded to trial where the jury found for the plaintiff and awarded $540,269.64. After the verdict, the defendant appealed, arguing in part that the trial court erred in denying its motion for summary disposition. The Court of Appeals reversed; it held that the trial court should have granted the defendant's motion for summary disposition.

The panel believed that the plaintiff presented no evidence to raise a genuine issue of material fact about pretext. *Doster v Covenant Med Ctr, Inc*, unpublished per curiam opinion of the Court of Appeals, issued September 17, 2020 (Docket Nos. 349560 and 350941), p 6. This was an error; when the evidence presented at the summary-disposition stage is viewed in the light most favorable to the plaintiff, reasonable minds can differ as

to whether age discrimination was a motivating factor in the defendant's decision to hire a younger candidate over the plaintiff. See *Johnson v VanderKooi*, 502 Mich 751, 761 (2018); *Hazle v Ford Motor Co*, 464 Mich 456, 465-466 (2001).

When reviewing a motion for summary disposition under MCR 2.116(C)(10), a court's role is narrow. It "considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Johnson*, 502 Mich at 761 (quotation marks and citation omitted). In its review of the evidence, the court cannot make findings of fact. *Minter v Grand Rapids*, 275 Mich App 220, 230 (2007), rev'd in part on other grounds, 480 Mich 1182 (2008).

In the motion for summary disposition and response, the parties disputed the significance of an interviewer's written notes which referenced the chosen candidate "being young." The plaintiff argued that this evidence supported pretext; the defendant disagreed. The trial court held that it could not make a finding of fact as to which interpretation was more likely. Thus, when viewed in a light most favorable to the plaintiff, the trial court held that the evidence created a genuine issue of material fact as to whether age discrimination was a motivating factor in the defendant's hiring decision.

The Court of Appeals, however, found that the defendant's explanation about this evidence was reasonable while the plaintiff's was premised on "speculation." *Doster*, unpub op at 7. And for that reason, it reversed the trial court. To be sure, speculation isn't enough to give rise to a genuine issue of material fact. *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 16 (2016). But it's not a reviewing court's proper role to choose between competing interpretations of facts, but rather to determine whether the trial court was correct when it determined there was a material dispute of fact requiring the motion be denied. The trial court did not err when it determined that, viewed in a light most favorable to the plaintiff, there was a genuine issue of material fact about whether this evidence supported pretext such that the case should not be dismissed before a trial.

Justice ZAHRA finds the evidence supporting the plaintiff's claim wanting as well. And his consideration of it is reasonable. But, respectfully, Justice ZAHRA makes the same mistake the panel did. In reviewing an appeal from a denial of a summary-disposition motion, our job is not to determine the best understanding of competing evidence, but rather whether the trial court was correct that there was a question of fact that merited a jury trial. Justice ZAHRA cites *Hazle v Ford Motor Co*, 464 Mich 456, to support his conclusion. But in that case, there was no evidence of pretext at all—only a statement made by the plaintiff's attorney. *Id.* at 474. Statements of counsel are not evidence. *Hazle* stands for the unremarkable proposition that a motion for summary disposition should be granted where there is no disputed evidence.

Justice ZAHRA also criticizes the Court's decision to involve itself in this case. We share his view that this Court should focus its time and attention on jurisprudentially significant issues. We believe the proper role of a reviewing court in determining that a litigant's claim should be dismissed is such an issue. And we assume that the jury that awarded the plaintiff $540,269.64 believed its time and attention was also significant. Reasonable minds could disagree about the evidence the plaintiff provided. The trial court was correct to let the jury decide which interpretation was more credible.

We do not retain jurisdiction.

ZAHRA, J. (*dissenting*).

I would deny leave to appeal because the Court of Appeals correctly determined that plaintiff presented insufficient evidence of age discrimination to survive defendant's motion for summary disposition. Although the record at the time of summary disposition contains evidence sufficient to create a prima facie case of age discrimination, defendant articulated a legitimate, nondiscriminatory reason for its action. Because plaintiff failed to offer any evidence that defendant's stated reasons were a pretext for discrimination, defendant was entitled to summary disposition as a matter of law.[1] The majority's contrary conclusion is wholly unfounded, as it is based solely on an out-of-context portion of an interviewer's note. Moreover, the Court's action of summarily reversing by order an unpublished opinion of the Court of Appeals is the latest in a series of cases in which the Court imprudently engages in error correction involving applications taken from unpublished opinions of the Court of Appeals. We should not spend our judicial resources on matters that lack jurisprudential significance. For these reasons, I dissent.

Plaintiff, Denise Doster, worked as a recruiter in the human resources (HR) department of defendant, Covenant Medical Center, Inc., for many years. When she was over 60 years old, plaintiff applied for a position as an HR generalist with defendant, but defendant hired Brent Ruddy, a 27-year-old, instead. Plaintiff then filed this age discrimination action, and defendant moved for summary disposition.

To avoid summary disposition of an employment discrimination claim, a plaintiff must proceed through the *McDonnell Douglas* framework.[2] Under that framework, "once a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case."[3] If the employer makes such an articulation, "the plaintiff must demonstrate that the

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[1] See *Hazle v Ford Motor Co*, 464 Mich 456, 477 (2001).

[2] *McDonnell Douglas Corp v Green*, 411 US 792, 802-803 (1973).

[3] *Hazle*, 464 Mich at 464.

evidence in the case, when construed in the plaintiff's favor, is sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff."[4] Whether plaintiff satisfied this last step is the issue on appeal.

Plaintiff was interviewed by a panel, but Alison Henige, defendant's HR manager, made the ultimate hiring decision. Henige testified that Ruddy was the best fit for the position because he had consulting experience and defendant needed someone who could "hit the ground running" as a consultant. In contrast, plaintiff did not have consulting experience. Another interviewer testified that, unlike plaintiff, Ruddy "could articulate and give past experience to [employment-related] questions." Plaintiff did not present evidence to dispel the testimony that experience was the basis of the hiring decision, let alone that age was a motivating factor. Indeed, she admitted that her consulting experience amounted to simply "talking" with people. Plaintiff testified that she believed that discrimination was the reason she did not get the job because another person with three years of experience in HR as a consultant got the job. She stated, "I just felt like I was discriminated against," adding that "[t]hey gave that job to him, and that was my job." Plaintiff's responses were similar to those of the plaintiff in *Hazle*, who stated, " 'Well, because I felt I was very qualified for the position and just from my own observation I just feel that I'm a better qualified person. They hired a Caucasian woman. So I felt it was a racial issue.' "[5] The *Hazle* Court explained that the plaintiff's subjective claim failed to create a genuine issue of material fact concerning whether the defendants discriminated in their employment decision.[6] Likewise, plaintiff's mere feeling here that she was discriminated against is not enough to overcome defendant's showing of a legitimate reason for its decision. This is especially so given that plaintiff plainly lacked the consulting experience of the applicant defendant hired.

To create an issue of material fact, the majority plucks two words out of the middle of a sentence in Henige's interview notes—"being young." These words, without more, are innocuous and insufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor in hiring Ruddy. Context matters. For example, had Henige made two columns, one identified as "pro" and the other as "con," and the words "being young" were written under the pro column, a reasonable inference of

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[4] *Id.* at 465 (quotation marks and citation omitted). This Court has inconsistently applied both "motivating factor" and "but for" causation standards in discrimination cases under the Civil Rights Act, MCL 37.2101 *et seq*. See *Hrapkiewicz v Wayne State Univ Bd of Governors*, 501 Mich 1067 (2018) (MARKMAN, C.J., dissenting). I take no position here on which standard is proper because the parties have not argued that we should apply the "but for" standard and because the outcome would be the same under either standard.

[5] *Hazle*, 464 Mich at 476-477.

[6] *Id.* at 477.

unlawful age discrimination could have been drawn in plaintiff's favor. But this was not the case. The context here proves damning to plaintiff's claim. Henige's notes summarize Ruddy's comments about values. She wrote, "Accountability—having the same standards & following them," and "Respect—being young—took a while to gain [respect with] leaders." Read in context, the note clearly indicates that Ruddy stated in his interview that, being young, it took a while for him to gain the respect of his leaders. The note does not in any way suggest that defendant relied on Ruddy's age when making its hiring decision. Henige's notes simply do not support plaintiff's claim as a matter of law.

Further, using the Court's limited resources to reverse the Court of Appeals' unpublished opinion in this matter is ill-advised. It has become commonplace for this Court to reverse by order perceived errors in opinions that are unpublished. This is a waste of our judicial resources, and it is not why the people of Michigan elected us to serve at the highest level of the judicial branch of government. As Michigan's court of last resort, we should use our precious resources to interpret the Constitution and laws of Michigan and to correct errors of lower courts that, if left uncorrected, will stain the fabric of Michigan's jurisprudence. The time expended on error correction is time taken away from matters that are of significant and vital concern to the more than 10 million people of Michigan.

For these reasons, I would deny leave to appeal.

VIVIANO and CLEMENT, JJ., join the statement of ZAHRA, J.